No. 15649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,

Appellee.

PETITION FOR REHEARING.

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To the Honorable William Healy, Walter L. Pope, Frederick G. Hamley, United States Court of Appeals for the Ninth Circuit, San Francisco, California:

Appellee and defendant, Union Pacific Railroad Company, a corporation, respectfully petitions for a rehearing in the above-entitled action and alleges as grounds therefore the matters hereinafter discussed.

(a) This petition is presented pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit.

(b) The Court erred in concluding that the award of the National Railroad Adjustment Board was not an award on "the merits," but rather was a "plain misconstruction of Price's submission to the board." (Opinion, p. 5.)

(c) The Court erred in concluding that the Board made no determination of the charge of insubordination against Price which resulted in his dismissal. In arriving at this conclusion, the majority opinion completely disregards the charges of insubordination investigated by the carrier on the property [Tr. 13], and also completely disregards the clear and unambiguous language of the Board which, after commenting on the result of such investigation, decided that *"This was insubordination and merited discipline."* [Tr. 57.]

(d) Although appellant did not seek a review of the Board's award, and although no issue concerning jurisdiction, notice, interpretation of award, validity of award, or due process of law is presented by the pleadings, or the Transcript on Appeal, or is otherwise before the court for review, the majority opinion nevertheless does review the award of the Board and reaches the factually erroneous conclusion that the Board denied only part of appellant's claim. This conclusion is contrary to the Board's award. Such review by the Court is contrary to the National Railway Labor Act, and court decisions construing the scope of court review of Board awards.

(e) The majority opinion fails to apply the general law on the subject of *res judicata,* and reverses the long-accepted practice of this Court, as well as other appellate tribunals, of viewing the evidence most favorable to appellee, and drawing all inferences fairly deducible from the facts in favor of the appellee.

It should be emphasized that the claim presented to the Board by Price was for reinstatement with pay for all time lost and all seniority and other rights restored. In support of this claim, Price submitted an extensive *ex parte* submission to the Board containing many self-serving declarations and other material which would be obectionable in a court of law. This is one of the advantages afforded an employee in pursuing his administrative remedy under the Act, instead of seeking redress by court action. Appellant's submission to the Board was not hindered by any exclusionary tactics on the part of appellee, and it was conceded by appellant that his entire claim was fully presented to the Board for its determination. The Transcript of Record, pages 5-56, discloses that all of the matters set forth in appellant's complaint were presented to the Board for adjudication. It should be noted, and emphazised, that the submission of appellant's claim to the National Railroad Adjustment Board was initiated by the appellant, and not by the carrier. It is respectfully submitted that, having voluntarily sought an adjudication of his controversy by the Board, appellant may not now evade the effect of the Board's award by arguing that the Board did not consider both elements of his claim. It therefore is essential to examine appellant's claim, as alleged in the complaint on file herein.

Specifically, what did appellant assert in his complaint as a violation of the collective bargaining agreement of April 1, 1943? Appellee respectfully directs the Court's

attention to Paragraph V of appellant's complaint [Tr. 4] in which appellant alleges violation of the agreement in the following respects:

(a) There was no thorough investigation made of the alleged faults on the part of plaintiff.

(b) Plaintiff was not afforded an opportunity to have a trainman of his choice present at the investigation held.

(c) Plaintiff was not afforded a reasonable opportunity to prepare his defense.

(d) Plaintiff was not afforded a reasonable opportunity to present his defense at the said investigation.

(e) Plaintiff was not present at the said investigation.

(f) Plaintiff was not afforded an opportunity to have witnesses present in his behalf at the said investigation.

(g) Plaintiff was denied the right to have witnesses present in his behalf at the said investigation at the expense of defendant.

(h) Plaintiff was not afforded a reasonable opportunity to participate in his own defense at the said investigation.

(i) Plaintiff was dismissed without cause.

It was conceded by appellant in his argument in the District Court, and before this Court, and it is assumed in the majority opinion of this Court, that each of the foregoing allegations in (a) through (h) was decided against the appellant in that portion of the Board's decision which discusses compliance with the investigation rule of the agreement. (Art. 33.) In addition to allegations (a) through (h), however, appellant also alleged in subparagraph "i" that he was dismissed without cause.

This claim, as well as the others alleged in the complaint, was presented to the Board in appellant's submission to the Board. There can be no doubt about appellant's disobedience of Operating Rules 700 and 702 of the company when he returned to Las Vegas, Nevada, from Nipton, California, contrary to express instructions to remain at Nipton. Appellant admits such return in his letter of July 27, 1949, to his local union in which he requested union action for his reinstatement. [Tr. 51.] Such admission is apparent throughout the submissions of appellant by his union on his behalf [Tr. 5-56], and appellant has never denied that he violated the Operating Rules in question. In this connection, it should also be emphasized that appellant submitted no counter-affidavits or denials in the District Court and made no request for a hearing for the purpose of offering parol evidence in opposition to the facts alleged in the affidavits and other evidence introduced by the appellee. All of such facts therefore stand admitted in the Record.

Appellant was charged with "violating Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting himself from duty without proper authority." [Tr. 13.] Appellant was discharged for violating these Operating Rules. [Employee's Ex. F, Tr. 32.] In the submission of his claim to the Board, appellant sought to justify such violation by reference to Section "b" of Article 32 of the Agreement, which is quoted in footnote 5 of the majority opinion. This attempted justification by appellant was in effect a plea of confession and avoidance, and appellee respectfully urges that the Board specifically decided that the confession was true but that the avoidance was without merit. It

is well settled that an employee who receives orders which he believes are in confiict with the agreement between his union and the carrier must nevertheless obey such orders, under penalty of dismissal, and later make such formal complaint as he believes to be justified.

The decision of the Board, after referring to the fact that a carrier must have employees who can be relied on to obey operating instructions and orders if it is to have efficient operation, states that "Claimant was found to have willfully disobeyed his orders." The majority opinion asserts that this finding was not made by the Board but rather by the superintendent of the railroad. The majority opinion further asserts that the Board neither found nor concluded that the railroad was entitled to discharge Price. Appellant strenuously disagrees with this statement in the majority opinion. Appellant urges that the Board by reference to and adoption of the same, approved and affirmed the finding that claimant willfully disobeyed orders. It is apparent that the majority opinion overlooks and completely disregards the language of the Board immediately following the foregoing quotation, because the very next sentence reads as follows: "This was insubordination and merited discipline." This is unquestionably language of the Board. It is not only a finding but is also a conclusion that Price was guilty of violating operating instructions, as charged in the investigation, and as found by the company, and that such violation was insubordination which merited discipline.

The word "discipline" is not an abstract term. It is taken from Article 33 of the Agreement dated April 1, 1943, and includes the dismissal of an employee. Paragraph (a) of said Article 33 provides that a transcript of the testimony of all witnesses will be furnished to the

general chairman upon request when "discipline" is administered. Paragraph (b) of said Article 33, which is integrated with paragraph (a), provides that if investigation, as provided in paragraph (a), results in *dismissal,* the case may be handled by the employee, or his representatives with the general manager of the carrier. Paragraph (c) of said Article 33 refers to reinstatement and provides that no reinstatement shall be made after two years from the date of dismissal unless the case is still under prosecution through regular channels or new evidence is secured. Appellee earnestly asserts that the Board made a specific finding of insubordination in violation of operating rules of the company, and found and concluded that such insubordination merited discipline which, under the terms of the agreement, includes "dismissal." The decision of the Board therefore completely disposes of appellant's claim of wrongful dismissal, as well as his complaint against the procedure followed under the investigation rule of the agreement. Appellee repeats the assertion that the Board decided appellant's *entire* claim against the appellant.

The Board's award was in these words: "Claim denied." The claim, which was denied, was for reinstatement with full pay and all rights restored. Appellant supported this claim before the Board by alleging wrongful dismissal, and dismissal in violation of the investigation rule of the agreement. The entire claim of appellant was denied by the Board. The majority opinion recognizes this fact at page 3 in these words: "The Board issued an award denying Price's claim in its *entirety.*" (Emphasis supplied.) However, after stating the foregoing correct fact, the majority opinion then erroneously decides that only a part of appellant's claim was denied

by the Board. In order to reach this conclusion, the majority opinion misconstrues certain language of the Board reading as follows: "The only question for review is whether there was substantial compliance with the investigation rule," and completely ignores other language of the Board reading as follows: *"This was insubordination and merited discipline."* In fact, the last-quoted sentence, which occurs first in the decision of the Board, is the foundation for the language emphasized in the majority opinion to the effect that the only question for review is whether there was substanital compliance with the investigation rule. Both statements by the Board must be given equal weight and it therefore necessarily follows that, having concluded that appellant was guilty of insubordination and deserved discipline, the only *remaining* question to be reviewed and commented on by the Board was whether or not there was substantial compliance with the investigation rule of the agreement.

The majority opinion correctly states that "Price did not seek a review of the Board award." Notwithstanding this correct statement, the majority of the Court proceeded to review the Board's award and undertook to construe it and interpret it, even though the Court, in keeping with Section 153, First (m), of the Railway Labor Act, and decisions construing said Act, concluded that awards of the Board are final and binding upon both parties to the dispute, except insofar as they shall contain a money award. Neither appellant nor his union ever doubted at any time that his claims had been denied in its entirety. On December 5, 1952, appellant wrote a letter to Mr. E. J. Connors [Tr. 63] requesting the company to give further consideration to his claim for reinstatement "after my claim has been heard and denied

by the Railroad Adjustment Board." If appellant had contended that the Board's denial did not decide his claim on the merits, either party could have sought an interpretation of the award in the light of such dispute and the Board would have been required to give such interpretation. (National Railway Labor Act, Sec. 153, Subd. First (m), cited in footnote 6 in this Court's opinion.)

Appellee again emphasizes the fact that appellant voluntarily sought the jurisdiction of the Board for an adjudication of his claim. Such jurisdiction, when voluntarily sought, as in the instant case, is exclusive under all of the decisions where this question has been raised.

"If one who is aggrieved and entitled to the benefits of the Act places his grievance for adjudication by the Adjustment Board upon merit, his voluntary action thereby fixes *exclusive* jurisdiction (emphasis supplied). In other words, such person may take the remedies provided by the Act, or he may bring his suit in court. He cannot do both. The award of the Board and the judgment of a court are equally final." (*Kelly v. Nashville, Chattanooga & St. Louis Ry.*, 75 Fed. Supp. 737.) The ruling in this case is especially significant because the plaintiff, through his union, had submitted a claim of wrongful discharge to the Board, but thereafter commenced his court action prior to a decision by the Board. Summary judgment was granted to the carrier, solely upon the basis of exclusive jurisdiction, even though there had been no decision by the Board, and therefore no final determination of the controversy on the merits.

The majority opinion ignores the general law of *res judicata* and its application to Board decisions. This general law is stated very clearly in the wrongful dis-

charge case of *Ramsey v. Chesapeake & O. R. Co.,* decided February 18, 1948, 75 Fed. Supp. 740 at 742. Summary judgment was granted to the carrier notwithstanding Ramsey's argument that the Board had not made specific findings upon all of the facts and issues involved, and his further argument that there were issues in his court case which had not been presented to the Board in his submission. After citing the Board's finding that it had jurisdiction over the dispute and the parties, the Court then stated:

> "Reference to the statements referred to in the submission to the National Railroad Adjustment Board indicates that all of the grievances of the plaintiff were presented to the Board, although the Board in its opinion does not seem to have made specific findings upon all the facts involved.
>
> "It would seem that, having presented his grievances to the Board, the plaintiff was bound by its decision under the language of Sec. 153, subd. 1 (m) (of the Railway Labor Act).
>
> "This seems to be in accord with the general law on the subject of res judicata: 'The general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided.' Covington & Cincinnati Bridge Co. v. Sargent, 27 Ohio St. 233; City of Cincinnati v. Emerson, 57 Ohio St. 132, 48 N. E. 667; Northern Pacific Ry. Co. v. Slaught, 205 U. S. 122, 130, 27 S. Ct. 442, 51 L. Ed. 738. Bolles v. Toledo Trust Co., 1940, 136 Ohio St. 517, 520, 27 N. E. 2d 145, 147."

In the *Ramsey* case, even though the Board did not, in its decision, make specific findings upon all of the facts or issues, the Court nevertheless concluded that the award

of the Board was final and binding, not only as to all issues which were presented to the Board, but also as to all issues which could have been raised and decided. This case is cited as stating the correct rule in *Barnett v. Penn.-Reading Seashore Lines,* 245 F. 2d 579 (C. A. 3rd, 1957).

The doctrine of *res judicata* in such cases is emphasized in 30 American Jurisprudence, Judgments, Section 339, reading as follows:

> "A judgment is essential to the operation of the doctrine of res judicata. * * * However, the fact that a judgment is rendered without an opinion does not preclude its operation as an estoppel as to particular issues involved in the action, and it has been held that a trial court's judgment is nonetheless res judicata of issues involved because rendered without a statement of findings of fact and conclusions of law."

In other words, with respect to the doctrine of *res judicata,* the principal questions are: (1) What did the tribunal (whether Board or Court) have before it for decision? (2) What was decided by such decision? The fact that a decision of a court or Board does not comment upon, or attempt to decide, each and every fact or issue does not affect the doctrine of *res judicata.* It is the judgment itself which is important and to which the doctrine of *res judicata* attaches. The basic and controlling question is not "what phrasing, sentencing or paragraphing did the tribunal use in its opinion," but rather it is "what did the tribunal do by its decision?"

The rule that an issue must actually have been litigated and determined does not mean that a person relying upon the judgment must probe the mind of the judge or in-

vade the jury room to ascertain the processes by which the result was reached, or that a court may speculate on what occurs in the recesses of judicial contemplation. (*St. Lo Constr. Co. v. Koenigsberger,* 84 App. D. C. 319, 174 F. 2d 25, 10 A. L. R. 2d 349, cert. den. 338 U. S. 821, 94 L. Ed. 498, 70 S. Ct. 66.)

The Railway Labor Act was enacted for the benefit of both employees and carriers. In the event of a dispute between an employee and his carrier, *either party* may invoke the jurisdiction of the Board (Sec. 153, First (i)) and thereby secure a speedy determination of the controversy. As was said in *Michel v. Louisville & N. R. Co.,* 188 F. 2d 224, cert. den. 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648: "Suffice it here to say that Congress provided procedure whereby the carriers and their employees might obtain a speedy and just determination of grievances by a body recognized as qualified by experience to settle such disputes by a hearing, which even if informal from the judicial standpoint, nevertheless affords opportunity for presentation and determination of claims by the application of rules and principles developed by experience and well understood by carriers, their employees, and union representatives." Under the majority opinion, appellee will be forced to relitigate a dispute which is now nine (9) years old. A brief reference to the facts set out in the majority opinion will disclose that appellant was discharged in July, 1949. He submitted his claim to the Board in January, 1951. The Board denied his claim in its entirety in June, 1952. If appellee is now forced to relitigate this same dispute, its rights under the Railway Labor Act will have been abrogated, and Section 153, First (i) of the Act, affording *either* party the right of Board decision, will become a nullity

as far as carriers are concerned. Appellee respectfully submits that it has a right to rely upon the Board decision, not only under the doctrine of *res judicata,* but also under the finality provision of the Railway Labor Act, and that the trial court did not have jurisdiction to entertain this action for damages.

Finally, appellee refers the Court to its often-cited opinion in the case of *United States v. Aspinwall,* 96 F. 2d 867, which is in accord with similar decisions of other appellate courts, and holds that an appellate court must view the evidence most favorable to appellees and draw all inferences fairly deducible from the facts in their favor.

Here the uncontroverted facts are that appellant was discharged for violation of operating rules; that he submitted his entire claim to the National Railroad Adjustment Board, and that his claim was denied in its entirety.

Appellee respectfully requests a rehearing and suggests that such rehearing, if granted, be submitted to the Chief Judge for a determination of whether the rehearing shall be *en banc.*

Resepectfully submitted,

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